No. 93-903

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES J. REICH,
Petitioner,
v.
MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CHARLES ROTHFELD
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

34 pp

QUESTION PRESENTED

Whether this Court's decision in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), compels respondents to pay tax refunds in the circumstances of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-908

CHARLES J. REICH,
Petitioner,
v.
MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici National Governors' Association, Council of State Governments, National Conference of State Legislatures, National Association of Counties, National League of Cities, International City/County Management Association, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal gov-

ernments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission, the official administrative agency of the Multistate Tax Compact, has a vital interest in disputes that may affect the administration of state tax systems.

This case presents an issue of enormous and continuing importance to *amici*: whether, and in what circumstances, States may be required to refund taxes collected pursuant to statutes that have been held unconstitutional. A stable and predictable source of revenue is essential to the operation of state and local governments. Yet as this Court has often noted, its jurisprudence interpreting the intergovernmental tax immunity doctrine, the Commerce Clause, and other provisions limiting state and local taxing authority, is at times confusing and unpredictable. It thus is inevitable that taxing schemes occasionally will be held to run afoul of the Constitution. If refunds for these violations are too readily available, state and local governments will face not only revenue shortfalls but also unexpected and potentially ruinous liability. At the same time, the prospect of disruptive refund liability will discourage States and local governments from tapping constitutionally permissible sources of funds. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

Petitioner's refund claim cannot prevail for three independent reasons. *First*, although petitioner entirely skips over the issue, we think it plain that principles of sovereign immunity preclude suits for money damages brought in state court against unconsenting States. The Court in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), expressly found it unnecessary to address this issue because the State in that case

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to this Court's Rule 37.3.

had waived its immunity. But Georgia plainly has not. In such circumstances, this Court *never* has suggested that an action for money damages may be implied directly from the Constitution. Indeed, it is implicit in *McKesson* itself that the Constitution does not create an absolute entitlement (and a federal cause of action) for the recovery of wrongfully collected taxes that overrides state sovereign immunity; the Court indicated in *McKesson* that the availability of refunds may be limited by state-law restrictions such as payment under protest requirements and statutes of limitations—restrictions that have force because they are aspects of the State's waiver of sovereign immunity.

Second, even if petitioner has a right to proceed with his refund action, he is wrong in arguing that a taxpayer pays under duress whenever there is the *possibility* that the State may compel the payment of taxes or provisions of state law encourage prompt payment. In fact, it has long been settled that duress is present only when a taxpayer pays to avoid the *immediate* imposition of a significant sanction. Petitioner also is incorrect in his contention that Georgia's pre-deprivation remedies are constitutionally inadequate because their availability was not clearly established at the time that he paid his tax; this Court has indicated that taxpayers must pursue pre-deprivation remedies that are not squarely foreclosed by state law. In any event, it is plain from the record here that petitioner failed to invoke pre-deprivation remedies, not because he was unaware of their existence, but because he believed that Georgia's tax was constitutional.

Third, even if the Court concludes that petitioner's action may proceed and that Georgia did not offer constitutionally adequate pre-deprivation process, the award of a refund is not a foregone conclusion. *McKesson* expressly left open the possibility that courts retain some equitable discretion in the formulation of remedies for due process violations. And here, the unfairness to the State and its citizens of requiring the payment of refunds is manifest.

The decision in *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989), which led to the invalidation of Georgia's tax, could not have been anticipated; requiring refunds therefore would unreasonably penalize the State and would, for the future, discourage States from exploring new tax policies.

ARGUMENT

To resolve this case, the Court will have to expand on the principles set out in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). There, the Court held that "if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *Id.* at 22. See *id.* at 31. The Court regarded this holding as an application of ordinary concepts of procedural due process, explaining that, "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause" (*id.* at 36-37 (footnote omitted)); the Court regarded meaningful relief (in the form either of a post-deprivation remedy or of an opportunity to preclude collection in the first place) as a necessary element of the State's procedure. See *id.* at 32.

The Court also explained that a constitutionally adequate regime may involve "a form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State." 496 U.S. at 36-37. The Court added:

> [I]f a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure.

Id. at 38 n.21 (citation omitted). The Court repeated this conclusion, without elaboration, in *Harper* v. *Virginia Department of Taxation*, 113 S. Ct. 2510, 2519-20 (1993). See also *Associated Industries* v. *Lohman*, No. 93-397 (U.S. May 23, 1994), slip op. 15.

While *McKesson* provides the backdrop against which this case must be decided, it leaves unanswered the questions that are dispositive here. The decision in *McKesson* simply does not speak to the question whether a State that has not waived its sovereign immunity may be held liable in money damages for use of an unconstitutional system of tax administration. The Court did not describe in any detail the "duress" that would make a system of pre-deprivation process inadequate. And the *McKesson* Court plainly seems to have contemplated that, even in cases where liability otherwise might be constitutionally mandated, equitable considerations may militate against the award of monetary relief. A close consideration of each of these issues makes clear that petitioner's refund claim should not prevail.

I. GEORGIA'S SOVEREIGN IMMUNITY PRECLUDES AN AWARD OF MONEY DAMAGES AGAINST THE STATE

1. Petitioner devotes virtually all of his brief to the argument that the Georgia system does not comport with the requirements of due process. In doing so, however, he entirely skips over a crucial threshold issue: whether

he has a right even to seek monetary relief from the State. In our view, petitioner's action for money damages, brought in state court against an unconsenting State, is precluded by principles of sovereign immunity.

While the ground advanced by petitioner in seeking a refund is the inconsistency of the challenged tax with the dictates of the intergovernmental tax immunity doctrine, his cause of action did not spring full-blown from the federal Constitution. Instead, petitioner initiated this suit in state court under a state cause of action. Yet the Georgia Supreme Court has held dispositively, as a matter of state law, that the state refund statute under which petitioner sued "does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid." Pet. App. 8D. The court also made clear that "in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last." *Ibid.* Petitioner thus himself acknowledges, albeit elliptically, that Georgia law does not provide him with a cause of action. See Pet. Br. 29-30. And because the refund statute is not applicable, the State has not waived its sovereign immunity from suit. See *Henderson* v. *Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972); *Ingalls Iron Works Co.* v. *Blackmon*, 133 Ga. App. 164, 210 S.E.2d 377 (1974).[2]

Rather than invoke a state-law remedy, petitioner appears to believe that *McKesson* meant to create, and that he may proceed under, a *federal* refund action that is

[2] The court below evidently did not rely on this point in dismissing petitioner's refund action because it believed "that our duty on remand [from this Court] is to determine whether Georgia law provided a predeprivation remedy to Reich sufficient to satisfy the requirements of federal due process as set out in *Harper* and *McKesson*." Pet. App. 3A-4A.

grounded directly on the Fourteenth Amendment and that overrides state sovereign immunity. *McKesson*, however, recognized no such federal right of action. The taxpayer in *McKesson* proceeded under a *state* cause of action (see 496 U.S. at 23-24), a point confirmed by the Court's explicit and repeated recognition that state procedural limits on refund suits (such as payment under protest requirements or statutes of limitations) may apply to bar a refund. See *id.* at 24-25 n.4, 45. And because the applicable refund statute waived the State's sovereign immunity in *McKesson*, the Court expressly found it unnecessary to determine whether a refund action could proceed absent such a waiver. *Id.* at 49 n.34.[3]

Against this background, it is important to distinguish two issues that are implicated by petitioner's argument. The first involves the requirements of procedural due process. As to this, *McKesson* concededly held that States must provide either a pre- or post-deprivation method of challenging wrongful taxation; when a State that has waived sovereign immunity and opened its courts to refund claims provides no pre-deprivation process, application of this principle could require the State to offer post-deprivation relief. The second and distinct issue is whether a State that has violated the due process principle recognized in *McKesson* and has *not* waived its sovereign immunity may be sued for money damages. That is a point to which *McKesson* expressly does not speak.

2. On that question, we think it plain that States may assert their sovereign immunity in their own courts against claims for money damages, even if the claims are grounded on the federal Constitution. Since the foundation of the Union, it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its

[3] The taxpayers in *Harper* also proceeded under a state cause of action that waived the State's sovereign immunity and, indeed, specifically extended the statute of limitations for claims grounded on *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989). See *Harper*, 113 S. Ct. at 2514.

own courts without its consent.'" *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989), quoting *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). See *Nevada* v. *Hall*, 440 U.S. 410, 420 (1979); *id.* at 431 (Blackmun, J., dissenting). While the specific question whether that immunity applies to federal claims advanced against the States in state court has been infrequently litigated, on those occasions when the Court has reached the issue it consistently has indicated that "[w]ithout [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever." *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636, 642 (1911). See *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929);[4] *Palmer* v. *Ohio*, 248 U.S. 32, 34 (1918); *Railroad Co.* v. *Tennessee*, 101 U.S. (11 Otto) 337, 339 (1880); *Beers*, 61 U.S. (20 How.) at 529.

Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution's ratification (see *Welch* v. *Texas Dept. of Highways & Public Transportation*, 483 U.S. 468, 480, 484 (1987) (plurality opinion); *id.* at 504-507, 511-13 (Brennan, J., dissenting); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 263-80 (1985) (Brennan, J., dissenting)), we are aware of no suggestion during those debates that state courts were obligated by the Constitution to entertain claims against States for money damages. See generally *ibid.* And that is hardly surprising; it was and is a fundamental tenet of sovereign immunity that, wherever else it may be haled into court,

[4] In *Conway*, the Court enjoined the collection of a Louisiana tax asserted to violate the Equal Protection Clause because state law would not allow for a refund if the tax ultimately were held to be unconstitutional, even where the taxpayer paid "under both protest and compulsion." 279 U.S. at 815. The Court's conclusion that this absence of a state remedy posed the risk of irreparable injury to the taxpayer (*ibid.*) certainly suggests that the Constitution would not of its own force mandate payment of a refund absent a waiver of sovereign immunity.

"no sovereign may be sued in its own courts without its consent." *Hall*, 440 U.S. at 416.

This view is confirmed by the modern understanding of the Eleventh Amendment, which of course bars federal courts from entertaining claims for money damages against the States (including claims for the refund of unconstitutional taxes). See *Kennecott Copper Co.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944). See generally *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986); *Edelman* v. *Jordan*, 415 U.S. 651, 668-69 (1974). While the Court has debated the meaning of the Amendment at length in recent years, in its most current analysis at least five Justices accepted the rule of *Hans* v. *Louisiana*, 134 U.S. 1 (1890), which rests on the proposition that suits against unconsenting States were "unknown to the law" at the time of the Constitution's ratification (*id.* at 15). These Justices thus recognized that the Eleventh Amendment applied to Article III of the Constitution (and to the federal courts) "the fundamental principle of sovereign immunity" that prevailed at that time. *Welch*, 483 U.S. at 472 (plurality opinion), quoting *Pennhurst State School & Hospital* v. *Halderman*, 473 U.S. 89, 98 (1984). See *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Atascadero*, 473 U.S. at 238.[5]

This view of state sovereign immunity is fully consistent with the Court's most recent close consideration of the Eleventh Amendment, *Pennsylvania* v. *Union Gas*

[5] See *Dellmuth* v. *Muth*, 491 U.S. 223, 229 n.2 (1989) (declining to overrule *Hans*); *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 57 n.8 (1989) (opinion of White, J.) (stating that *Hans* should not be overruled); *id.* at 33-35 (opinion of Scalia, J.) (stating that *Hans* should not be overruled). Justice White joined the plurality opinion in *Welch*, while the Chief Justice and Justices O'Connor, Scalia, and Kennedy seemingly have endorsed that opinion. See *Union Gas*, 491 U.S. at 30-35 (opinion of Scalia, J.). The *Welch* plurality opinion therefore appears to express the views of a majority of the Court.

Co., 491 U.S. 1 (1989), in which a splintered Court held that Congress may override the States' Eleventh Amendment immunity when exercising its power under the Commerce Clause. The plurality reasoned that, "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action." *Id.* at 22 (plurality opinion). But as this language itself indicates, the four Justices in the plurality accepted the existence of state sovereign immunity even in *federal* court in the absence of congressional action. See, *e.g.*, *id.* at 19 (emphasis added) ("Congress has the authority to *override* States' immunity when legislating pursuant to the Commerce Clause"). The four Justices in dissent, meanwhile, read the Eleventh Amendment as reflecting "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted." *Id.* at 31-32 (opinion of Scalia, J.). Needless to say, neither these opinions, nor Justice White's separate opinion, suggested that state courts need entertain actions against States that cannot be brought in federal court.[6]

[6] One of this Court's decisions, *General Oil Co.* v. *Crain*, 209 U.S. 211, 226 (1908), occasionally is cited for the proposition that a State may not assert its sovereign immunity in its own courts against federal constitutional claims. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1095-1096 (1983). But *Crain*—which predated many of the cases we cite above—is slender authority for such a profound proposition, "for more reasons than just the age and moderate obscurity of the case." *Id.* at 1096. *Crain* was an action brought in state court against a state official seeking injunctive relief for an asserted violation of the Commerce Clause. This Court rejected the State's argument that its courts lacked jurisdiction to hear the claim, reasoning that the Eleventh Amendment would make injunctive relief unavailable in federal court and that there must be some means of enforcing the Constitution in some court. 209 U.S. at 226-27. Because the Court went on to reject the Commerce Clause claim on the merits, the jurisdictional issue might not have been carefully analyzed. In any event, the suit was not one for monetary relief. And the proposition upon which the Court grounded its jurisdictional discussion—that the Eleventh Amendment would bar a federal court from entertaining a claim against a state official for prospective relief—plainly no longer is valid (even if it was at the time *Crain* was decided). Indeed, Justice Harlan concurred separately, maintaining that the existence of jurisdiction "certainly is a state, not a Federal question. Surely, [the State] has the right to say of what class of suits its own courts may take cognizance." *Id.* at 233 (Harlan, J., concurring). Not surprisingly, "[n]o modern case has held that state courts have an obligation to hear claims barred from the federal courts by the eleventh amendment." Fletcher, *supra*, 35 Stan. L. Rev. at 1096.

By ratifying the Constitution, the States thus did not consent (in the absence of congressional action) to the assertion against them of constitutional claims in federal court. This being so, it is difficult to imagine why, by the same ratification, they should be understood to have taken the unlikelier step of irrevocably waiving the fundamental protection of sovereign immunity against constitutional claims in their own courts. That the States did not take such a step has been the clear understanding of the Court, which has emphasized that States *may* supplement whatever remedies for constitutional violations are available in federal court "by waiving their immunity from suit in state court on state-law claims." *Welch*, 483 U.S. at 488 (plurality opinion) (footnote omitted). See *Will*, 491 U.S. at 85 (Brennan, J., dissenting). And this conclusion is only logical. The United States, after all, is bound by the Constitution to the same extent as are the States, yet it is not amenable to suit on constitutional claims in its own courts absent a waiver of immunity. Cf. *Union Gas*, 491 U.S. at 34 (opinion of Scalia, J.).

3. As this reasoning makes clear, when a State declines to create a cause of action to remedy the collection of unconstitutional taxes, a federal remedy (either in federal or in state court) is not available directly under the Constitution on the theory of *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). For sovereign im-

munity (and Eleventh Amendment) purposes, the distinction between prospective injunctive and retrospective monetary relief is fundamental. Whether or not a *Bivens* action is available in federal court against state officials for *prospective* relief under the Constitution, the Eleventh Amendment—a textual limitation on suit in federal court that trumps the *Bivens* remedy—would bar a federal court from awarding money damages. The availability of an action in state court under a *Bivens* theory, meanwhile, is a matter of state law, and state sovereign immunity rules would be fully applicable in such an action.[7]

Indeed, it is implicit in *McKesson* itself that the Constitution does not create an absolute entitlement (and a federal cause of action) for the recovery of wrongfully collected taxes that overrides state sovereign immunity. If there were such an entitlement, state-created restrictions on state-law refund actions, such as payment under protest rules, statutes of limitations, and standing restrictions—which have force because they are aspects of the State's waiver of its sovereign immunity (see, *e.g.*, *Ingalls Iron Works*, 133 Ga. App. at 165, 210 S.E.2d at 378)—could not be applied to limit a taxpayer's recovery. But *McKesson* (as well as the decisions upon which it relied) expressly held that not to be so, indicating that States may "provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint * * * [or may] enforce relatively short statutes of limitations applicable to such actions." 496 U.S. at 45 (footnote omitted). See also *Ward* v. *Love County Board of Comm'rs*, 253 U.S. 17, 25 (1920) (refund may be barred if there was "any valid local [limitations] law in force when the claim was filed"). And it can hardly be the case that a State that has created a refund action may hedge it about with limitations, but that state liability is *unlimited* whenever (as in this case) the State has not created an applicable refund action at all.

[7] The Court has explained that it is "[t]he federal courts' statutory jurisdiction to decide federal questions" under 28 U.S.C. § 1331 that "confers adequate power to award damages to the victim of a constitutional violation" on a *Bivens* theory. *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). *See id.* at 374; *Bivens*, 403 U.S. at 395-96; *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). Whether the state statutes creating the jurisdiction of state courts confer similar power on those courts is a matter for the States.

In sum, the Georgia system would, under *McKesson*, violate the Due Process Clause if it did not provide adequate pre- or post-deprivation process, and a taxpayer could obtain injunctive relief to bring the system into conformity with such constitutional requirements. But nothing, either in *McKesson* or in the Court's more general jurisprudence of remedies, would make monetary relief available against an unconsenting State. To the contrary, while it may be that full compensation would be available for every wrong "[i]n the best of all possible worlds" (*Parratt* v. *Taylor*, 451 U.S. 527, 531 (1981)), the Constitution never has been understood to guarantee monetary relief as a remedy for all constitutional violations.[8]

From its inception, our system has recognized sovereign and official immunities that may make it impossible for injured parties to obtain money damages. "Modern doctrines, beyond any peradventure, depart decisively from the notion that the Constitution requires effective remedies for all victims of constitutional violations. Sovereign

[8] It may be that the only exception to this principle involves claims under the Just Compensation Clause, which is uniquely self-executing and secures a right to "*compensation* in the event of * * * a taking" (*First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original)) that may overcome even the sovereign immunity of the United States. *Cf. Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n.5 (1986). Indeed, the presence of such language in the Fifth Amendment—and in that Amendment alone—suggests that other provisions of the Constitution were *not* designed to make monetary relief available of their own force.

immunity remains undiminished as a constitutional concept." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1784 (1991) (footnotes omitted). See *id.* at 1781. The United States and (as we have explained) the individual States always have been permitted to assert sovereign immunity as a defense to claims for retrospective monetary relief, whether or not those claims were grounded on the Constitution. See generally *United States* v. *Mitchell*, 445 U.S. 535 (1980); *Sherwood* v. *United States*, 312 U.S. 584 (1941); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821). And this Court itself has created the extensive series of official immunities that sometimes bar the award of money damages against government officials for constitutional violations. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635 (1987); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Butz* v. *Economou*, 438 U.S. 478 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978). See also *United States* v. *Stanley*, 483 U.S. 669 (1987); *Bush* v. *Lucas*, 462 U.S. 367, 372-73 & n.9 (1983); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). A holding that the Constitution makes money damages available against States in the tax refund setting would be an unprecedented and wholly unwarranted departure from this Court's consistent past practice. Such a holding, moreover, would make no logical sense: it is impossible to understand how it is that immunity doctrines may bar *any* recovery for deprivations of liberty or even life (see, *e.g.*, *Stanley*, 483 U.S. at 683-84) but may not come into play to preclude a recovery for a simple procedural due process violation leading to the deprivation of property.

4. In addition, even if sovereign immunity did not wholly preclude this Court from creating a damages action against unconsenting States, compelling prudential considerations would militate against such a course. If sovereign immunity is not regarded as an absolute bar to the creation of such a remedy, the policies that underlie

the doctrine nevertheless retain constitutional stature; in a case where the state courts find money damages unavailable, those policies should make any federal court, including this one, reluctant to take the unprecedented step of creating a monetary remedy against a State. That is particularly so when *Congress* chose not to make the States liable for money damages in enacting the principal vehicle for the enforcement of federal constitutional rights, 42 U.S.C. § 1983. See *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58 (1989).

Moreover, the nature of the federal system does not require judicial creation of a monetary remedy: as the Court has recognized, "the availability of prospective relief of the sort awarded in *Ex Parte Young*[, 209 U.S. 123 (1908),]" suffices to "give[] life to the Supremacy Clause." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). At the same time, institutional considerations suggest that the Court should hesitate before constitutionalizing the rules governing money damages—a course that would require the Court to assess the validity of every state remedial rule and that would transform every denial of a federally based action for a tax refund into a federal claim that could be brought to this Court. Some of that danger is visible in this case, where petitioner asks the Court to apply a four-year statute of limitations, rather than the three-year period normally applicable to tax refund claims in Georgia. See Pet. Br. 30.

It may be added that failure to create a damages remedy does not give States free reign to run roughshod over constitutional rights. Either state or federal courts would stand ready to provide declaratory or injunctive relief to terminate constitutional violations.[9] See *Will*, 491 U.S.

---

[9] While the Tax Injunction Act, 28 U.S.C. § 1341, ordinarily bars federal courts from enjoining the collection of state taxes, that prohibition does not apply when the state courts do not provide a "plain, speedy and efficient" method of challenging unconstitutional taxation.

at 58 & n.10; *Welch*, 483 U.S. at 488; *Papasan*, 478 U.S. at 276-77. Indeed, in the Eleventh Amendment setting the Court has concluded that the line between prospective and retrospective relief is the appropriate one to use in reconciling competing constitutional concerns, explaining that prospective relief is available in

> cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as [in] cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."

Papasan, 478 U.S. at 277-78, quoting *Green*, 474 U.S. at 68.

Perhaps most fundamentally, the creation of remedies for the enforcement of the Fourteenth Amendment is textually committed to Congress by the Constitution. Congress's enforcement powers under the Fourteenth Amendment (and, the Court held in *Union Gas*, under the Commerce Clause) include the authority to create actions against the States for money damages. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *Union Gas*, 491 U.S. at 19-22 (plurality opinion). The creation of remedies for fundamentally unfair activity on the part of the States is therefore appropriately left to congressional action. This Court accordingly should hold that petitioner's request for money damages is precluded by principles of sovereign immunity or, alternatively, should direct the Georgia Supreme Court to consider the issue on remand.

II. GEORGIA PROVIDES ADEQUATE PRE-DEPRIVATION REMEDIES

If the Court nevertheless concludes that petitioner may proceed with his claim, it should hold that the Georgia system accords with the requirements of due process because it provides meaningful pre-deprivation remedies. In arguing to the contrary, petitioner contends both that Georgia compels taxpayers to pay prior to bringing a challenge (Br. 11-17), and that the State does not, in fact, provide any pre-deprivation method for contesting the legality of a tax (Br. 17-26). These arguments are without merit. Because respondents in their brief comprehensively address the particulars of Georgia law, we focus here on the constitutional standards that govern petitioner's claim.

A. The Georgia System Does Not Place Taxpayers Under Duress To Pay Prior To Challenging A Tax

In *McKesson*, the Court held that post-deprivation relief must be provided when "a State penalizes taxpayers for failure to remit their taxes in timely fashion" (496 U.S. at 22) or "places a taxpayer under duress promptly to pay a tax when due." *Id.* at 31. The Court explained that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure." *Id.* at 38 n.21. The Court cited for this proposition *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363, 368 (1973); *Ward* v. *Love County Board of Comm'rs*, 253 U.S. 17, 23 (1920); *Gaar, Scott & Co.* v. *Shannon*, 223 U.S. 468, 471 (1912); and *Atchison, T. & S.F.R. Co.* v. *O'Connor*, 223 U.S. 280, 286 (1912). See also *Harper*, 113 S. Ct. at 2519-20 n.10. Petitioner evidently is of the view that "duress" in this sense is present whenever there is the *possibility* that the State may compel payment or whenever provisions of state

law encourage the prompt payment of taxes. See Pet. Br. 10. This contention, however, is plainly wrong.

1. In fact, it has long been settled that duress is present only when a taxpayer pays to avoid the *immediate* imposition of a significant sanction. Well over a century ago, Justice Field, writing for the Court, set out the controlling standard:

> To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, * * * there must be some *actual or threatened* exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of *immediate* relief than by making the payment. * * * [T]he doctrine established by the authorities is, that "a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid."

Radich v. *Hutchins*, 95 U.S. (5 Otto) 210, 213 (1877) (emphasis added) (citation omitted).

The Court expanded upon this analysis the following year, in *Railroad Co.* v. *Comm'rs*, 98 U.S. (8 Otto) 541, 543-44 (1878) (citation omitted), stating:

> "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefore, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."

The Court accordingly held that the "real question" in such a case is "whether there was * * * an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion." *Id.* at 544. The Court found no such necessity where the

county treasurer held a warrant authorizing the seizure of the taxpayer's property but had not yet attempted to serve it, had not made a personal demand for the taxes, "and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him." *Id.* at 545.

Similarly, in *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906), a taxpayer brought a refund action after paying a tax in circumstances where payment was a prerequisite for the release of its ships from port; failure to pay was a misdemeanor punishable by fine. See *id.* at 493-494. But citing to *Railroad Co.*, the Court found no "imminence" in the prospect of punishment and, accordingly, no duress. *Id.* at 494. The Court also deemed it significant that the taxpayer failed to tell collection authorities at the time of payment that he "was acting under the restraint of the law and yielding only to enable his ships to depart to their destinations," (*ibid.*), although the Court added that " 'even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed.' " *Id.* at 492 (citation omitted). Accord *Chesebrough* v. *United States*, 192 U.S. 253, 259-60 (1904); *Little* v. *Bowers*, 134 U.S. 547, 555-56 (1890). There is no reason to doubt that these decisions, three of which were cited with approval in *Mississippi Tax Comm'n*, 412 U.S. at 368 n.11 (citing *New York & Cuba Mail Steamship Co.*, *Little*, and *Railroad Co.*) remain good law today.

2. The validity of this principle is made clear by considering the cases, including *McKesson*, in which the Court found duress to be present; all involved penalties that were immediate and draconian. In *McKesson* itself, the State was able to levy on the taxpayer's goods, to impose a penalty of 50% along with interest of 1% per month, and—most significantly—to revoke (or decline to

renew) a liquor distributor's license to do business in Florida, a step that evidently could be taken without giving the taxpayer a pre-deprivation opportunity to have the constitutional issue resolved. See 496 U.S. at 38 n.20.[10] The decisions cited in *McKesson* involved similar sanctions.[11]

The Court in *McKesson* also quoted *O'Connor* to the effect "that a taxpayer pays 'under duress' when he proffers a timely payment merely to avoid a 'serious disadvantage in the assertion of his legal . . . rights' should he withhold payment and await a state enforcement proceeding in which he could challenge the tax scheme's validity 'by defence in the suit.'" 496 U.S. at 38 n.21, quoting 223 U.S. at 286. This observation has no bearing here. The *O'Connor* Court indicated that the sort of "serious disadvantage" it had in mind was that faced by the plaintiff in *Ex Parte Young*, 209 U.S. 123 (1908), where violation of the challenged state law was a felony punishable by lengthy imprisonment and substantial fines.

[10] In addition, the Court appeared to assume that Florida law simply did not provide a pre-deprivation remedy, stating that "Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida requires taxpayers to raise their objections to the tax in a postdeprivation refund action." 496 U.S. at 38-39 (footnote omitted). In contrast, as respondents explain in their brief, Georgia law plainly provides pre-deprivation avenues for relief.

[11] See *Mississippi Tax Comm'n*, 412 U.S. at 368 n.11 (State "made clear * * * that severe sanctions would be applied" for nonpayment of liquor tax; taxpayers would be forced to stop dispensing liquor and would have "to discontinue an entire line of business"); *Ward*, 253 U.S. at 23 (county "made it appear to the claimants that they must choose between paying the taxes and losing their lands"); *O'Connor*, 223 U.S. at 286 (taxpayer faced, in addition to accumulated penalties, the immediate prospect of "having its contracts disrupted and its business injured"); *Gaar, Scott & Co.*, 223 U.S. at 471 (nonpayment would lead to 25% penalty, cancellation of right to do business, and elimination of right to sue for relief).

See *id.* at 145-47; *O'Connor*, 223 U.S. at 286. In *Ex Parte Young*, the Court held that "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147. The Georgia penalties described by petitioner are of a different order of magnitude altogether.

Perhaps the most illuminating of these early holdings for present purposes is *Gaar, Scott & Co.*, which is cited in *McKesson* (496 U.S. at 38 n.21)—and was cited in, and decided on the same day as, *O'Connor* (223 U.S. at 286-87). There, the Court indicated that "[n]either a statute imposing a tax, *nor the execution thereunder, nor a mere demand for payment*, is treated as duress. It does not necessarily follow that there will be a levy on goods." 223 U.S. at 471 (emphasis added). On the other hand, the Court held that a taxpayer may maintain a refund action

> if he pays under compulsion of a statute, whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date a penalty of twenty-five per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as duress than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back.

Ibid. Focusing on the interruption of the taxpayer's activities (rather than on the 25% penalty), the Court went on to hold that a taxpayer could maintain a refund action if, "under the duress of [the law's] automatically enforced provisions, [it] had paid the tax to avoid the disruption of its business." *Id.* at 472.

Taken together, these decisions plainly stand for the proposition that the accumulation of financial penalties and the simple existence of uninvoked levy provisions cannot, without more, constitute duress. Instead, the cases must be read as holding that a taxpayer is coerced to pay only when he does so to avoid an immediate sanction—seizure of property, termination or disruption of business, criminal prosecution, and the like—that is so substantial as, realistically, to give him "no choice at all." *Mississippi Tax Comm'n*, 412 U.S. at 368 n.11. Viewed in this light, the Georgia penalties, which are relatively modest and will be collected only after final adjudication of the dispute, pose "no such imminence in the duress." *Cuba Mail Steamship Co.*, 200 U.S. at 494. The same is true of the possibility of criminal prosecution, of a levy, or of imposition of a lien (see Pet. Br. 11-14, 16-17); petitioner here has not, and clearly could not, assert that he paid the tax " 'to release his person or property from detention, or to prevent an immediate seizure of his person or property.' " *Railroad Co.*, 98 U.S. at 544 (citation omitted).

3. Having said this, it should be added that the older decisions addressing duress are not directly on point here. The discussion of duress in those cases did not involve procedural due process issues; instead, duress was relevant because of the rule that taxing authorities (either state or federal) had no common law obligation to refund illegal taxes that were paid voluntarily. Under this rule, voluntary payment was viewed as equivalent to a procedural default or failure to comply with a statute of limitations. See, *e.g.*, *Gaar, Scott & Co.*, 223 U.S. at 470-71. The Court considered the question of duress in cases coming from state courts because, like any other procedural default, voluntary payment constituted an independent and adequate state ground that would preclude the exercise of federal jurisdiction. See *ibid.*; *O'Connor*, 223 U.S. at 285; *Ward*, 253 U.S. at 22-23. While the Court's discussion of duress in these cases is suggestive here, there

is no reason to assume that the common law standard is identical to that applicable under the Constitution.

Instead, the proper inquiry should involve application of modern principles of procedural due process, of the sort that underlay the decision in *McKesson*. And on that score, the Court has made clear that " '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' " *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) (citation omitted). Determining whether the State's process comports with constitutional requirements thus " 'will depend on appropriate accommodation of the competing interests' " (*Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982), quoting *Goss*, 419 U.S. at 579)—private interests on the one hand and, on the other, "the Government's interest, including the function involved and the fiscal and administrative burdens that * * * additional or substitute procedural requirement[s] would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). See also, *e.g.*, *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 501-504 (1993); *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 542-45 (1985); *Logan*, 455 U.S. at 434. Indeed, the Court in *McKesson* acknowledged the applicability of this balancing approach in the tax setting. 496 U.S. at 50.

Under this inquiry, Georgia's system plainly strikes an acceptable balance and therefore does not deny taxpayers their right to have claims heard "at a meaningful time and in a meaningful manner." *Logan*, 455 U.S. at 437 (citations omitted). See *Mathews*, 424 U.S. at 333. On Georgia's side of the equation, the importance of preserving penalties for late payment and summary remedies for the frivolous withholding of taxes is compelling. The Court has emphasized repeatedly (as it did in *McKesson* itself, see 496 U.S. at 37 & n.19) that the State has a paramount interest in the unimpeded collection of taxes. Yet without the penalties imposed by Georgia law, taxpayers would have every incentive *not* to pay their taxes

in a timely fashion; a refusal to pay would be cost-free (and if interest were not assessed, actually beneficial to the taxpayer).

On the other hand, Georgia taxpayers are not subjected to a penalty until their claims have run their course (unlike, for example, the liquor distributors in *McKesson*, who could have lost their licenses and been put out of business during the pendency of any pre-payment litigation), and are not penalized at all if their claims ultimately are proved meritorious. And while the Georgia penalties are not trivial, they are hardly so substantial that a taxpayer with the courage of his convictions will feel that he has no choice but to pay in advance. Compare, *e.g.*, *Ex Parte Young*, 209 U.S. at 145-47.

The controlling standard, after all, is not whether the taxpayer's challenge is entirely worry-free; it is whether the taxpayer had a "meaningful opportunity" to obtain pre-deprivation relief. *McKesson*, 496 U.S. at 38 n.20. Modest penalties of the sort imposed by Georgia do not deny a reasonable taxpayer that opportunity. And a taxpayer can hardly claim that he paid under duress because the State could have—*but did not*—invoke a summary remedy, particularly when "nothing had been done from which [the taxing authority's] intent could be inferred to use the legal process [it] held to enforce the collection." *Railroad Co.*, 98 U.S. at 545.

B. Petitioner Was Obligated To Invoke Georgia's Pre-Deprivation Remedies

Petitioner also is wrong in contending (at Pet. Br. 17-26) that Georgia's pre-deprivation remedies are constitutionally inadequate because their availability was not clearly established at the time petitioner paid his tax. This argument is entitled to no weight; because petitioner did not pay his taxes under protest for the years at issue here, and did not otherwise indicate that he believed the Georgia tax to be unconstitutional, there is no reason to

believe that he would have made use of even the most well-settled remedies.

This point also refutes petitioner's argument (at Pet. Br. 26-29) that the Georgia Supreme Court unfairly pulled the rug out from under him by unexpectedly ruling that the refund statute is inapplicable in the circumstances of this case. Petitioner plainly did not rely on the availability of the refund statute in failing to invoke pre-deprivation remedies during tax years 1980-1988 (the period for which he now demands refunds); he failed to invoke those remedies because he did not believe at the time that the Georgia tax was unconstitutional. Indeed, when petitioner realized in March 1989 that the tax was unconstitutional, he did *not* pay the tax with the expectation that he would get it back under the refund statute; instead, he effectively invoked pre-deprivation remedies by refusing to pay the then-due portion of his 1988 tax—a portion that he never has paid. See Pet. Br. 5.

In any event, the standard of "clarity" advanced by petitioner is wrong. In *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930)—a case upon which petitioner relies (see Pet. Br. 27)—the Court held that a statute providing for pre-deprivation administrative remedies did not offer adequate relief because, at the time the taxpayer would have brought its pre-deprivation challenge, the statute had been authoritatively held by the state Supreme Court *not* to provide a remedy. See *id.* at 681-682. But the Court also made clear that "[h]ad there been no previous construction of the statute by the highest court [of the State], the plaintiff would, of course, *have had to assume the risk* that the ultimate interpretation by the highest court might differ from its own." *Id.* at 682 n.9 (emphasis added). That principle is dispositive here; by petitioner's own account, the availability of at least one of the pre-deprivation remedies was no worse than "unclear" (Pet. Br. 24) and another actually had been applied by the Georgia Supreme Court. *Id.* at 19. Petitioner plainly was obli-

gated to invoke these remedies which, as the court below has now conclusively held, were available to him.

III. EQUITABLE CONSIDERATIONS WOULD PRECLUDE THE AWARD OF REFUNDS IN THIS CASE

Finally, even if the Court concludes that petitioner's action may proceed and that Georgia did *not* offer constitutionally adequate pre-deprivation process, the award of a refund is still not a foregone conclusion. Although petitioner wholly ignores the issue, *McKesson* expressly left open the possibility that courts retain some equitable discretion in the formulation of remedies for a due process violation. Florida had argued in that case that the good-faith reliance of its officials on a presumptively valid tax made a refund inequitable. Rather than dismiss the argument as irrelevant, the Court addressed and rejected it on the merits, stating that "even were we to assume that the State's reliance on a 'presumptively valid statute' was a relevant consideration to Florida's obligation to provide relief for its unconstitutional deprivation of property, we would disagree with the Florida court's characterization of the Liquor Tax as such a statute." 496 U.S. at 45-46. See *id.* at 50 ("the State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise").[12]

Since *McKesson*, the four Justices who have expressly addressed the issue have reaffirmed the view that the equities may come into play in the formulation of a remedy. Justice O'Connor, joined by Chief Justice Rehnquist, explicitly endorsed the conclusion that "[i]n a particularly compelling case * * * the equities might permit a State to deny taxpayers a full refund despite having refused

[12] As the Court explained, "[t]he Liquor Tax reflected only cosmetic changes from [a] prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984). * * * The State can hardly claim surprise at the Florida courts' invalidation of the scheme." *McKesson*, 496 U.S. at 46.

them predeprivation process." *Harper*, 113 S. Ct. at 2537 (O'Connor, J., dissenting). And Justice Souter, joined by Justice Stevens, concluded in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2448 (1991), that "[n]othing we say here [prevents the State] from demonstrat[ing] reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal."[13]

This concern for the equities applies with special force to tax challenges—like this one—involving levies imposed prior to the Court's decision in *McKesson*. Having announced the rule that States must make either pre- or post-deprivation relief available, the *McKesson* Court reasoned that "*in the future*, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available only to those taxpayers paying under protest, or enforcing relatively short statutes of limitations applicable to refund actions." 496 U.S. at 50 (emphasis added). It was thus "[t]he State's ability in the future to invoke such procedural protections [that] suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." *Id.* at 45. The Court found nothing inequitable in Florida's inability to make retroactive use of these procedural protections because its tax was clearly unconstitutional at the time of enactment. See *id.* at 46, 50.

Here, in contrast, the unfairness to the State and its citizens of requiring the payment of refunds is manifest. In our view, the decision in *Davis*, which led to the in-

[13] In her *Harper* dissent, Justice O'Connor suggested that the *Harper* majority might have foreclosed any appeal to the equities. See 113 S. Ct. at 2537. But it seems unlikely that *Harper* meant to go beyond what the Court had said in *McKesson*. That is particularly so because the five-Justice majority in *Harper* included Justices Stevens and Souter, who had just indicated in *Beam* that they meant to reserve the equitable question.

validation of the Georgia tax, could not have been anticipated. Two of the four Justices to address the issue in *Harper* (the Chief Justice and Justice O'Connor) concluded that *Davis* marked a sharp break in the law (see 113 S. Ct. at 2532-33 (O'Connor, J., dissenting)); another two Members of the Court believe that *Davis* was wrongly decided. See *Barker* v. *Kansas*, 112 S. Ct. 1619, 1626 (1992) (Stevens, J., joined by Thomas, J., concurring). And seven of the nine state courts to address the issue also concluded that the test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), does not mandate retroactive application of *Davis*. See *Harper*, 113 S. Ct. at 2515 & n.6 (citing cases). In such circumstances, "requiring refunds even when a finding of unconstitutionality would be highly unpredictable could both discourage the states from exploring new tax policies and unreasonably penalize adherence to old ones." Fallon & Meltzer, *supra*, 104 Harv. L. Rev. at 1831. This Court accordingly should preclude the award of refunds on this basis or should direct the Georgia Supreme Court, on remand, to consider the equities in formulating a remedy.

CONCLUSION

The judgment of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

CHARLES ROTHFELD
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

May 25, 1994